Industrial Construction Services, Inc. *and* International Brotherhood of Electrical Workers, Local 479, AFL–CIO. Case 16–CA–17186

June 19, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

The principal issue presented in this case[1] is whether the administrative law judge correctly found that the Respondent Industrial Construction Services, Inc. did not violate Section 8(a)(3) and (1) of the Act by failing to consider for hire 17 applicants for employment because of their affiliation with the Union.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

We agree with the judge that there is no evidence that the Respondent treated the applications of 17 alleged discriminatees in a disparate fashion. Furthermore, the General Counsel failed even to demonstrate that the official responsible for making the Respondent's hiring decisions had any knowledge of the 17 applicants' connection with the Union when he hired other applicants. Under these circumstances, notwithstanding proof of unlawful statements indicating that the Respondent might not hire known union adherents, the judge properly recommended dismissal of the complaint's allegation of a violation of Section 8(a)(3) and (1) of the Act based on the failure to hire any of the 17 applicants.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Industrial Construction Services, Inc., Beaumont, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] On November 22, 1996, Administrative Law Judge Richard J. Linton issued the attached decision. The General Counsel filed exceptions and a supporting brief.

[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There are no exceptions to the judge's finding that the Respondent violated Sec. 8(a)(1) on two occasions.

Robert G. Levy II, Esq. (trial only) and *Ruth Small, Esq.* (brief only), for the General Counsel.

Charles E. Sykes, Esq. and *Judith Batson Sadler, Esq. (Bruckner & Sykes)*, of Houston, Texas, for the Respondent.

Larry L. Moore, Repr. (IBEW Local 479), of Beaumont, Texas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. This is a "salting" case in which, the General Counsel alleges, Industrial Construction Services, Inc. (ICS), since about September 6, 1994, failed to consider for hire 17 named job applicants for employment at a Federal prison construction project in Beaumont, Texas. Finding no prima facie case that ICS unlawfully failed to consider the applications of the 17, I dismiss that (the major) portion of the complaint.

I presided at this 1-day trial in Houston, Texas, on May 28, 1996. Trial was pursuant to the January 11, 1996, complaint and notice of hearing (the complaint) issued by the General Counsel of the National Labor Relations Board (the Board) through the Regional Director for Region 16 of the Board.

The complaint is based on a charge filed February 7, 1995, by International Brotherhood of Electrical Workers, Local Union 479, AFL–CIO (the Union, Local 479, or the Charging Party), against Industrial Construction Services, Inc. (ICS, Respondent, or the Company).

In the complaint, the General Counsel alleges that ICS violated Section 8(a)(1) of the Act when, in February 1995, alleged Supervisor Mike Norco made two alleged economic threats against employees respecting union membership and union organizing, and further violated Section 8(a)(3) of the Act "Since about September 6, 1994," for refusing "to consider for hire" 17 named job applicants. By its answer, ICS admits certain facts, but denies violating the Act.[1]

The pleadings establish that the Board has both statutory and discretionary jurisdiction over ICS, that ICS is a statutory employer, and that IBEW Local 479 is a statutory labor organization.

For witnesses, the General Counsel called Dennis Okey, Daniel S. Hetzel, Rex "Skip" Owens, and Walter Harold McNeely. Both the General Counsel and the Charging Party then rested. (1:274–275.)[2] Okey, ICS' director of labor relations and safety (1:37), was called under FRE 611(c). Hetzel is Local 479's business manager and financial secretary. (1:119.) An electrician, Owens worked for ICS on the Beaumont project as, first, a journeyman electrician (1:170), as an estimator (1:171, 206), and later, in 1995, as an electrical foreman (1:172). Owens left ICS on a reduction in force (RIF) about April or May 1995. (1:182, 204.) McNeely, who served as a "salt" for the Union while working for previous employers, worked for ICS as, apparently, an electrician from December 19, 1994, until he was laid off in August 1995. (1:232, 250.)

Other than taking Hetzel (out of order during the General Counsel's case-in-chief) as its own witness under FRE

[1] All dates are for 1994 unless otherwise indicated.

[2] References to the one-volume transcript of testimony are by volume and page. Exhibits are designated GCX for the General Counsel's and RX for Respondent Delta's.

611(c) for a few questions (1:142–158), ICS called no witnesses and rested (1:275) immediately after the General Counsel and the Union rested. There was no rebuttal stage.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and by ICS, I make these

FINDINGS OF FACT

A. *Respondent's Business; Early Contact with the Union*

Operating as an electrical contractor in the construction industry, ICS has its corporate headquarters in Westminister (Denver), Colorado. (1:38–39; pleadings.) In 1994 ICS became the successful bidder on a Federal prison project in Beaumont, Texas. (1:39–40.) ICS contracted with Dick Enterprises to perform job 167, and staffing began in June 1994. (1:40.) ICS obtained the contract for a second aspect, job 171, with a different contractor, Caddell Construction. (1:42.)

In May 1994, Business Manager Hetzel went to Colorado and met with the IBEW (skilled workers, including apprentices), and to get a "project agreement" or "Letter of Assent A or Letter of Assent B." In turn, Okey asked whether "market recovery" funds were available. Hetzel said no, explaining that, under Federal law, the Union could not legally subsidize a contractor on Davis-Bacon jobsites.[3] Okey understood that the Union, as part of a "market recovery" program, offers a lower wage scale on some projects. (1:76–79.) ICS had bid the project at Davis-Bacon rates, and Okey testified that the value to ICS of a market recovery rate would have been a cushion to offset any adverse differences in productivity factors between ICS's method of operating and that provided under union work rules. Okey agrees that Hetzel (1:121) offered to do the work at the rate bid by ICS, a figure about $1 an hour below the Union's wage scale. (1:79–82.) The meeting ended with Okey's saying he would submit the matter to ICS's board of directors. With no offer from the Union of market recovery money, ICS's board of directors rejected the Union's proposal (1:78, Okey). Some 6 to 8 weeks after their May meeting, Okey called Hetzel and notified him that the ICS board of directors had decided not to use a union agreement on the Beaumont job. (1:124, Hetzel.)

About a year after their Denver meeting, Hetzel wrote Okey a May 12, 1995 letter. In the letter (GCX 5), Hetzel mentions certain matters relating to the qualifications of the ICS work force, asserts that ICS is not hiring union applicants, and, in effect, renews its May 1994 request that ICS enter into a project agreement with the union. (1:128.) Taking Hetzel's letter as a renewed request, Okey resubmitted the matter to ICS's board of directors, with the same result. (1:87.) Although Hetzel does not recall that Okey called and reported the result (1:127), I credit Okey (1:88–89) that he did.

[3] Hetzel does not know which Federal law so provides. (1:120–121, 137.) Although Okey does not recall the topic's being mentioned (1:102–103), I credit Hetzel. Actually, Okey, with notice to Hetzel, tape recorded the meeting. (1:76–77, 105, 124.)

B. *The Hiring Process*

The Union faxed resumes to ICS. (1:125, 128.) Because ICS's policy is not to accept faxed resumes or job applications, Okey assumes that his assistant returned the resumes with copies of job application forms. (1:66, 90–91, 95–96; GCX 4, number 4.) Of the 17 alleged discriminatees named below, and in complaint paragraph 10, applications were sent for at least 16 and probably all 17. ICS admits that it received them as grouped below by date of the application. (1:96–97; pleadings; GCX 6.)

September 9, 1994	*September 27, 1994*
Dwaine Thibodeaux	Davide Baker
	Lane Batson
September 10, 1994	Earnest Bayard
	Donald Hoffpauir
Larry Moore	Chris Kibbe
	John Klinkhammer IV
September 16, 1994	Rodney Marioneaux
	Howard Pruett
Calvin Harris	Marvin Paul Schroeder Jr.
Henry Pinner	James Siau
	Yolanda Smith
	Kenneth Tiner
	Robert Truncale

Alleged discriminatee Paul Schroeder Jr. is not named in ICS's summary (GCX 6) compiled (1:13–15) from its business records. A name which does appear, with an application also dated September 27, 1994, is that of Marvin Schroeder. (GCX 6 at 2.) Okey testified that the "AIC" beside each name on the summary indicates that the person was named in the unfair labor practice charge. (1:113.) Accordingly, I infer that the Schroeder named in the complaint is the same person named on the summary, with his full name apparently being Marvin Paul Schroeder Jr.

Not one of the alleged discriminatees was hired. (1:95; GCX 6 at 1–2.) Neither, however, were other journeymen who also applied during September–October 1994. (GCX 6 at 1–2.) However, in the column for hiring category, the alleged discriminatees are simply labeled as "AIC," meaning "Applicant [named] in charge." (1:113–114, Okey.) The others who applied, unsuccessfully, during the September–October time frame, were assigned a hiring category number of either C-3 (a referral) or C-4 (unknown applicant). (GCXs 4, 6.)

Since early 1994, ICS has used a hiring priority system which places applicants in one of four categories: C-1 (current employees eligible for rehire requesting transfer); C-2 (former employees eligible for rehire [who meet safety, attendance, work records, and skills requirements]; C-3 (referral by current supervisors or nonsupervisory employees, by certain Government programs, or by specialty employment agencies); and C-4 (unknown applicants). (GCX 4; 1:42–47.)

The ICS handbook (GCX 2) states that ICS rates applicants and enters their names in a database. As openings develop, applicants are contacted. Those with the highest ratings are contacted first. However, Okey testified that the only rating is whether the application is complete. If complete, the application receives 20 points. No additional points are awarded for experience. (1:67–69.)

C. *Animus*

The complaint alleges that ICS violated Section 8(a)(1) of the Act when, about February 21 and 23, 1995, Respondent, by Mike Norco, informed employees that union membership "was a big strike against" job applicants. ICS denies.

A related 8(a)(1) allegation is that, about February 23, 1995, Mike Norco "threatened employees that they would be discharged if the Union succeeded in organizing." ICS denies.

The complaint alleges that, at all material times, Norco was a statutory supervisor and a statutory agent. ICS denies. I need consider only the agency allegation.[4] Norco is the only person who directed the crew on which McNeely worked. Norco interacted with Electrical Superintendent Rick Giddens, an admitted supervisor, and he attended at least one meeting of supervisors. As ICS placed Norco in a position where employees could reasonably believe that he spoke on behalf of management, I find that, at all relevant times, Norco was ICS's statutory agent.

Based on McNeely's credible and uncontradicted testimony, I find that, on February 21, 1995, McNeely asked Norco (who did not testify) about hiring his brother, Michael McNeely (1:263), who was an electrician and who also had been a union member in years past. Norco replied that the fact McNeely's brother had been in the union would be "a big strike against him." (1:247–248.) Two days later, on February 23, McNeely asked Norco whether he had spoken with Superintendent Giddens about hiring his brother. Norco said no. McNeely said that his brother had called the Union and learned that he still was a union member and that the Union wanted to see him hired on the Beaumont job. Norco said he would not pursue the matter because ICS did not want to hire union personnel. (1:248–249.) McNeely secretly tape recorded the February 23 conversation. (1:250, 259–260.) ICS moved to strike McNeely's description of the February 23 conversation on the basis that the tape recording would be the best evidence of the conversation. I denied ICS' motion. (1:250.)

As alleged by the General Counsel, I find that ICS violated Section 8(a)(1) of the Act by "Foreman" Norco's February 21, 1995 "big strike" statement. I find that Norco's February 23 statement that he would not pursue the matter of getting Michael McNeely hired because ICS did not want to hire union personnel, while not alleged as unlawful, violated Section 8(a)(1) of the Act as a threat of refusal to hire because of union activities. The matter was tried by implied consent under FRCP 15(b) when ICS failed to object or move to strike. There being no evidence in support of complaint paragraph 8's discharge threat, I shall dismiss that allegation.

Earlier, on January 4, 1995, McNeely overheard a radio conversation between Superintendent Giddens and Norco. Giddens told Norco to find out how employee Time Gren had heard about the job and had gotten hired.[5] To McNeely's later question of why Giddens was so asking, Norco replied that ICS was making background checks on all employees "to avoid hiring union personnel." (1:246, 262–263.) At trial, the General Counsel disavowed any intention of seeking an unfair labor practice finding regarding the January 4 radio incident. (1:246–247.) However, the incident reflects animus based on the credited testimony of McNeely.

As explained by Rex "Skip" Owens, background checks in fact were underway. Apparently in early 1995, some 2 months after he had been promoted to electrical foreman, Owens was given a list of employees on the job and told to check the names of those he had recommended. Owens initialed some six names on the list. Electrical Superintendent Giddens said that ICS would be checking on their references. (1:175–176, 184–186.)

D. *Discussion*

The General Counsel argues (Br. 5) that the Union would be a "specialty employment agency" under ICS' hiring policy (GCX 4), and therefore the applications of the 17 alleged discriminatees should have been placed in category C-3. Instead, because they were union referrals, "the employer dropped them to C-4." Moreover, the General Counsel argues, by failing to give rating points for experience (contrary to ICS's own handbook policy), and by screening referrals with background checks, ICS was making every effort to avoid hiring union personnel. As stated by ICS' statutory agent, Michael Norco, ICS wanted to avoid hiring union personnel.

As ICS observes (Br. 19), the record is devoid of evidence relating to what was contained in the 17 applications. Moreover, ICS argues (Br. 21–22) that there is no evidence Labor Relations Director Okey ever saw the faxed resumes or otherwise became aware that the 17 applications in question were from union members.

Okey is the ICS official who oversees the job application process, including the application database. Business Manager Hetzel testified that he observed some of the job applications being faxed to ICS, and that he was unaware of any ICS rule that faxed copies of applications are not considered. (1:129.) As Hetzel did not personally operate the fax machine (1:125), he perhaps did not inspect the applications. They, or at least the ones (RXs 9, 10) in evidence (none of the 17 are in evidence) contain the following warning, in bold print, at the bottom of the first page: *"Photocopies of this form will NOT be accepted."*

There is no evidence concerning what ICS did with the 17 faxed applications. Hetzel did not testify that he received them back. Indeed, there is no evidence that the 17 applications were faxed with a cover letter from the Union, or even that the 17 were faxed in sequence. The record indicates that, even if the 17 were faxed in sequence, the faxing was done as applications from 17 individuals using a fax machine with the same telephone number. There is no evidence that ICS, and Okey in particular, was aware the 17 applications came from members of the Union or from the Union's fax machine. There is no tie to the resumes because the record suggests nothing more than that Okey's assistant, Phyllis Bringle, under her standing instructions (1:95–96), handled the matter herself by sending a blank application to everyone who faxed a resume. Okey assumes that is what Bringle did here. (1:96.) Thus, it appears that Bringle sent a blank application to each of the 17, and not 17 blank applications to the Union.

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[4] *Bat-Jac Contracting*, 320 NLRB 891 fn. 2 (1996); *United States Service Industries*, 319 NLRB 231 fn. 2 (1995).

[5] Gren was hired on November 21, 1994, from category C-3 assertedly on a referral by Giddens himself. (GCX 6 at 3.)

But even if Bringle alerted Okey when the 17 faxed applications arrived, there is no evidence concerning what ICS, and particularly Okey, did with the 17 applications. All we know is that at a later point, after the instant charge was filed and served in this case on February 7, 1995, ICS was able to prepare a summary document (GCX 6) listing all applicants for the Beaumont job, with the list including the 17. In the column for the hiring policy category (C-1 through C-4), no category is assigned to the 17. Instead, each is identified as "AIC"—meaning an applicant named in the charge.

Under ICS' written policy (GCX 4, number 4), faxed copies of job applications "will not be considered for employment," and the bolded statement on the applications themselves warned the 17 (and the Union) that photocopies of the applications would not be considered. There is no evidence disclosing whether ICS, and particularly Okey, considered the 17 faxed applications in violation of company policy. As the applications were fax copies, presumably Okey, under ICS policy, did not consider the 17 applications. Okey was not asked. There is no evidence that ICS has ever deviated from company policy by accepting, and considering, faxed or photocopied applications.

In the absence of disparity evidence, the General Counsel has not proved, by a preponderance of the evidence, that ICS, even if it did not consider the faxed applications of the 17 discriminatees for the Beaumont job, failed to disregard company policy and consider the 17 faxed copies as part of an effort to keep union members off the Beaumont job. In his May 12, 1995 letter (GCX 5) to Okey, Hetzel's comments include:

> Further proof of IBEW 479 electricians' qualifications was sent to you by way of facsimile beginning in August of 1994. A total of 119 resumes were faxed, applications were filled out and mailed to your Colorado office, yet you continue to hire around Union workers on a daily basis.
>
> Why, when we applied first, would you hire an unqualified electrical work force to perform electrical work on a Federal project?

Okey never responded to the final question (1:127, Hetzel), although, as I have found, Okey did later call Hetzel and report that the ICS board of directors had rejected the Union's renewed request (of May 1995) for, as Okey understood, a project agreement. (1:86–89.)

The General Counsel argues (Br. 11) that, because ICS rested without presenting any evidence (actually, as I noted earlier, ICS did call Business Manager Hetzel out of order for a few questions), the evidence "must be considered in the light most favorable to the General Counsel." That is incorrect because it confuses Motions for Summary Judgment and for judgment on the pleadings with the trial stage. For example, on a motion to dismiss and for judgment on the pleadings, a court accepts as true all allegations of the complaint, and all inferences are drawn in favor of the plaintiff. *Sheppard v. Beerman*, 94 F.3d 823, 827 (2d Cir. 1996); *U.S. v. Colorado Supreme Court*, 87 F.3d 1161, 1164 (10th Cir. 1996). However, once the plaintiff has presented his case on the merits to the trier of fact, the question (on a motion to dismiss the complaint for lack of a prima facie case) is whether, if believed, the evidence of the plaintiff (the General Counsel, here) would establish a prima facie case by proving the allegations by a preponderance of the evidence. The critical qualification is "if believed." As the trier of the fact, an ALJ may be so unimpressed with the General Counsel's case-in-chief (especially when it involves demeanor analysis) that the ALJ may grant a motion to dismiss based on disbelief of the General Counsel's case-in-chief witnesses. *Royal Zenith Corp.*, 263 NLRB 588 (1982).

The General Counsel's problem here is that the General Counsel's evidence does not come to grips with the core issues of whether ICS considered the 17 applications, and if it did not, why did it not do so. If it did not do so because of ICS policy that copies of applications will not be considered, then what evidence is there that shows, by a preponderance of the evidence, that ICS did not disregard established company policy because it did not want to hire union members on its Beaumont job? Animus is shown, and suspicious circumstances abound. But that is not enough in the absence of disparity. In the absence of disparity evidence, ICS was not required, either before trial or at trial, to respond to anyone regarding the insufficiency of faxed applications, especially when the application forms carry a warning, in bold print, that photocopies will not be considered. Because the evidence on the core questions fails to show, by the required legal standard, unlawful motivation, I therefore shall dismiss the refusal-to-consider allegation, complaint paragraphs 11 and 12.

CONCLUSION OF LAW

Based on the record, I find that the Board has statutory and discretionary jurisdiction; that Respondent ICS is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; that Local 479 is a statutory labor organization; that ICS violated Section 8(a)(1) of the Act, but not Section 8(a)(3) of the Act; and that ICS's violations have affected and, unless permanently enjoined, will continue to affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Portions of standard paragraphs of the order are included in compliance with *Indian Hills Care Center*, 321 NLRB 144 (1996).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Industrial Construction Services, Inc. (ICS), Beaumont, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Telling employees that membership in a union, even past membership, is a big strike against their chances of being hired by ICS.

(b) Telling employees that referrals by current employees of applicants who are union members will not be pursued because ICS does not want to hire union personnel.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its jobsite in Beaumont, Texas, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 7, 1995 (the date the charge was filed in this case).

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint, including paragraphs 8, 11, and 12, is dismissed insofar as it alleges violations of the Act not specifically found.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT tell you that union membership, even past membership, is a "big strike" against the chances that job applicants will be hired by Industrial Construction Services, Inc. (ICS).

WE WILL NOT tell you that referrals by current employees, of job applicants who are union members, will not be pursued because ICS does not want to hire union personnel.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

INDUSTRIAL CONSTRUCTION SERVICES, INC.